

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

<hr/>		X	
MATTATHIAS SCHWARTZ,	:		
	:		
Plaintiff,	:		
	:		
v.	:	Case No. _____	
	:		
UNITED STATES DRUG ENFORCEMENT	:		
ADMINISTRATION,	:		
	:		<b><u>COMPLAINT UNDER THE</u></b>
Defendant.	:		<b><u>FREEDOM OF INFORMATION ACT</u></b>
<hr/>		X	

Plaintiff Mattathias Schwartz, for his Complaint under the Freedom of Information Act against Defendant United States Drug Enforcement Administration (“DEA”), alleges upon knowledge with respect to his own acts and matters set forth below that are taken from the public record, and upon information and belief with respect to all other matters, as follows:

**NATURE OF THE ACTION**

1. Plaintiff brings this action pursuant to the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, seeking the disclosure of certain agency records that Defendant DEA has improperly withheld in response to Mr. Schwartz’s FOIA request dated August 27, 2012 (the “Request”).

2. The FOIA Request concerns the DEA’s involvement in a raid in Ahuas, Honduras in May 2012 (the “Ahuas Incident”). The Ahuas Incident, and the DEA’s response thereto, has been the subject of substantial media coverage and is a matter of significant public interest. Moreover, the fact that the United States was involved in a raid in Ahuas, Honduras in May 2012 that resulted in the deaths of multiple Hondurans is plainly in the public domain. *See, e.g.,* Thom

Shanker & Charlie Savage, *Video Adds to Honduran Drug Raid Mystery*, N.Y. TIMES, Jun. 23, 2012, <http://www.nytimes.com/2012/06/23/world/americas/video-adds-to-mystery-of-drug-mission-in-honduras.html>; Geoff Earle & S.A. Miller, *State Department Stymied Probe Into Shooting of Four Hondurans*, N.Y. POST, Jun. 12, 2013, [http://www.nypost.com/p/news/national/state\\_death\\_puzzle\\_DEPZ3ToAeUUxLhL2djtrkK](http://www.nypost.com/p/news/national/state_death_puzzle_DEPZ3ToAeUUxLhL2djtrkK).

3. Over a year has passed since Plaintiff submitted the Request. The DEA has provided no responsive records to Plaintiff, no indication that any of the records are subject to applicable exceptions under FOIA, no guidance regarding which (if any) records it plans to eventually disclose, and no guidance regarding the timing of any decision with respect to disclosure. Even if certain of these records are properly exempted under FOIA, Plaintiff believes the bulk of these records should be reasonably segregable and subject to release. At a minimum, the DEA has no justification to further withhold the video recordings referenced in paragraph 9(c) herein, which have already been released to and reported on by the *New York Times*.

4. Accordingly, Plaintiff brings this action for an order (a) compelling the DEA to provide Plaintiff with copies of the records; (b) awarding Plaintiff's counsel, Jenner & Block LLP ("Jenner"), its reasonable attorneys' fees and costs, as authorized by 5 U.S.C. § 552(a)(4)(E)(i); and (c) other and further relief as the Court may deem just and proper.

#### **JURISDICTION AND VENUE**

5. This Court has jurisdiction over this action pursuant to 5 U.S.C. §§ 552(a)(4)(B), (a)(6)(E)(iii), and 28 U.S.C. § 1331.

6. Venue in this district is proper under 5 U.S.C. § 552(a)(4)(B).

## **PARTIES**

7. Plaintiff Mattathias Schwartz is a freelance investigative journalist with a principal place of business in Brooklyn, New York. His work has appeared in *The New Yorker*, *The London Review of Books*, *Harper's*, *Wired*, and *The New York Times Magazine*. He received the 2012 Livingston Award for International Reporting for *A Massacre in Jamaica*, which appeared in the December 12, 2011 issue of the *New Yorker*. Mr. Schwartz is working on a forthcoming article for *The New Yorker* and the records that are the subject of this suit are sought in support of research for this article.

8. Defendant DEA is an agency of the United States as defined in 5 U.S.C. § 552(f)(1). Its responding office is located in Springfield, Virginia. It has possession of and control over the records that Plaintiff seeks, and denying Plaintiff access to the records that he seeks is in contravention of federal law.

## **FACTUAL BACKGROUND**

### **a. The Request**

9. By letter mailed to the DEA on August 27, 2012, attached hereto as Exhibit A, Plaintiff submitted the Request to the DEA seeking copies of the following records (the "Requested Records"):

- a. All documents relating in whole or in part to an operation that took place in or around the town of Ahuas, Honduras on May 10 and/or May 11, 2012 (the "Incident").
- b. All documents relating in whole or in part to any subsequent investigation of the above incident.

- c. All video recordings and digital images of the Incident, including those shown to Congressional aides and reporters from the *New York Times* as described in the June 23, 2012 story “Video Adds to Honduran Drug Raid Mystery” by Thom Shanker and Charlie Savage. (A copy of the article is attached hereto as Exhibit B.)
- d. Any of the following specific documents relating to the above incident: Report of Investigation; teletype or other written and/or electronic communications between the SAC responsible for Honduras in May 2012 and other offices in the DEA, including Headquarters; any internal communications and/or reports produced by the DEA’s Office of Investigations; any internal documents, reports, and/or findings from the DEA Review Board; any internal documents, reports, and/or findings from the DEA’s Office of Professional Responsibility.
- e. All Reports of Shooting Incidents taking place in Honduras or Honduran territorial waters between January 1, 2012, and the date of the request.

10. Mr. Schwartz also requested expedited handling of the Request.

11. In a letter dated September 10, 2012, a copy of which is attached hereto as Exhibit C, the DEA acknowledged receipt of Mr. Schwartz’s letter. In the acknowledgment, the DEA provided notice of “unusual circumstances,” which extends an agency’s time to make a FOIA determination by ten working days, for a maximum of thirty working days. *See* 5 U.S.C. § 552(a)(6)(B)(iii). The DEA added, however, that it did not expect a determination to be made within the statutorily prescribed timeframe, and instead stated that it would act “promptly” when the Request was “next in the processing queue.”

12. In a separate letter, also dated September 10, 2012, the DEA denied Mr. Schwartz's request for expedited processing. A copy of the letter is attached hereto as Exhibit D.

**b. Agency Response**

13. After over eight months of agency silence, Plaintiff contacted DEA on May 21, 2012 to inquire about the status of his request. He spoke with Mr. William "Chip" Taylor, the FOIA specialist assigned to the Request, who indicated that material responsive to the Request had been collected by the DEA and was being reviewed by the DEA's general counsel. The DEA did not provide any determination about a timeline for a response.

14. Following this firm's retention in June 2013, Plaintiff's counsel left multiple voicemails for Mr. Taylor, beginning on June 7, 2013, to inquire about the status of Plaintiff's Request. On June 12, 2013, Mr. Taylor confirmed to Plaintiff's counsel by telephone that the DEA had gathered all responsive materials and that the Request was in front of the DEA's general counsel. When Plaintiff's counsel requested a timeline for a determination, Mr. Taylor told plaintiff's counsel to call the following week.

15. Between June 17, 2013, and June 25, 2013, Plaintiff's counsel left several voicemails inquiring into the status of the DEA general counsel's review. On June 26, 2013 – two weeks after the DEA's previous response – Mr. Taylor left a voicemail stating that "chief counsel's" office was meeting the following day to discuss Plaintiff's request and "other FOIA cases related to the 'Honduras incident.'" He stated that he would have more information following the meeting about timing of a response to the Request.

16. Between June 26, 2013 and July 9, 2013, Plaintiff's counsel left several additional voicemails for Mr. Taylor asking for information about the DEA's review of the Request. On July 9, 2013, Mr. Taylor left another voicemail indicating that the chief counsel met, and that

they had a “few things for [Mr. Taylor] to review [and] clarify for Mr. Schwartz” and that the DEA would get a response out “as soon as we can.” Later the same day, Plaintiff’s counsel reached Mr. Taylor by telephone. Mr. Taylor indicated that he had to “revise some things” and that there may be additional review by the DEA general counsel’s office. He again declined to provide any timeline for a determination.

17. Between July 15, 2013 and July 19, 2013, Plaintiff’s counsel again made several unsuccessful attempts to obtain information about a determination of the Request. On July 19, 2013 – over ten months after the Request was submitted – Mr. Taylor indicated that “not much changed.” The DEA had had more meetings, and was “trying to get all the Honduras FOIA-related requests to be released at the same time, so they are going through all of them, reviewing the papers, as well as the videos.” Mr. Taylor said that he could not give “a date certain” when “these things would drop,” but indicated that the DEA “was progressing” and would try to “get it out as soon as possible.”

18. Following the July 19, 2013 voicemail, Plaintiff’s counsel made several unsuccessful attempts to reach Mr. Taylor. Mr. Taylor responded in an August 1, 2013 voicemail, and again stated that “not much has changed,” and although the “chief counsel’s office has finally finished reviewing all the Honduras-related FOIA” and would send Mr. Taylor a report, the DEA was unable to provide an estimate on when it would provide a response.

19. Following the August 1, 2013 voicemail, Plaintiff’s counsel made multiple attempts to reach Mr. Taylor, and left a voicemail requesting some indication of which categories of records would be or would not be released. On August 6, 2013, Mr. Taylor left an additional voicemail for Plaintiff’s counsel stating, “You said you wanted a sneak peak at what you were

getting for Christmas. Unfortunately, you have got to wait for Christmas morning to open your presents. I wish I could let you know early, but we are letting everyone know at the same time.”

**c. The FOIA Appeal**

20. Pursuant to FOIA, Plaintiff’s counsel transmitted an appeal letter, dated August 2, 2013 (the “Appeal Letter”), to DEA challenging the DEA’s constructive denial of the Request. A copy of the Appeal Letter is attached hereto as Exhibit E. The letter was received at DEA’s FOIA/AP Unit on August 5, 2013.

21. In the Appeal Letter, Plaintiff reminded DEA of its statutory obligation to respond to a FOIA request within the statutory timelines, and that failure to do so would deem a requester’s administrative remedies exhausted. Appeal Letter at 3 (quoting *Citizens for Responsibility & Ethics in Wash. v. FEC*, 711 F.3d 180, 184 (D.C. Cir. 2013) (“[I]t is not enough that, within the relevant time period, the agency simply decide[s] to later decide. . . . [T]he agency must at least inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions.”). Plaintiff asked that the DEA respond to his Appeal Letter within twenty working days of receipt of the Appeal Letter as required under FOIA. 5 U.S.C. § 552(a)(6)(A)(ii).

22. Over twenty working days have elapsed since DEA’s receipt of the Appeal Letter. It has not responded to or otherwise acknowledged Plaintiff’s Appeal Letter as required by FOIA. 5 U.S.C. § 552(a)(6)(C).

23. Accordingly, Plaintiff has fully exhausted his administrative remedies under for his FOIA request, and now turns to this Court to enforce the remedies and public access to agency records guaranteed by FOIA.

**CLAIM FOR DISCLOSURE**

24. Plaintiff incorporates and realleges in full paragraphs 1–23 of this Complaint as if fully set forth herein.

25. Per the statements of DEA FOIA Specialist Taylor, the DEA has possession of the Requested Records enumerated in the Request.

26. DEA, as an agency subject to FOIA, 5 U.S.C. § 552(f), must disclose in response to a FOIA request any disclosable record in its possession at the time of the request, *id.* § 552(a)(3), and provide a lawful reason for withholding any materials as to which it is claiming an exemption, *id.* § 552(a)(6)(A)(i).

27. No FOIA exemption applies to the Requested Records and DEA has failed to invoke any FOIA exemption in response to the Request.

28. DEA's failure to disclose the redacted portions of the Document violates FOIA.

**RELIEF REQUESTED**

WHEREFORE, Plaintiff Mattathias Schwartz respectfully requests that this Court:


- (1) Order Defendant DEA to disclose unredacted copies of the Requested Records to Jenner;
- (2) Award Plaintiff's counsel, Jenner & Block LLP, its costs and reasonable attorneys' fees in this action; 5 U.S.C. § 552(a)(4)(E)(i); and
- (3) Grant such other and further relief as the Court may deem just and proper.

*(signature page follows)*



Dated: September 6, 2013  
New York, New York

JENNER & BLOCK LLP

By: 

George H. Freeman  
Carl N. Wedoff  
Jenner & Block LLP  
919 Third Avenue, 38th Floor  
New York, New York 10022-3908  
Tel: 212-891-1600  
Fax: 212-909-0815  
gfreeman@jenner.com  
cwedoff@jenner.com

*Counsel for Plaintiff*

## Exhibit A

Freedom of Information Operations Unit (SARO)  
Drug Enforcement Administration  
700 Army Navy Drive  
Arlington, VA 22202

Mattathias Schwartz  
630 NW Culpepper Terrace  
Portland, OR 97210

Re: Freedom of Information Act Request

August 27, 2012

Dear Freedom of Information Act Officer:

This is a request under the Freedom of Information Act. I hereby request copies of the following records:

- All documents relating in whole or in part to an operation that took place in or around the town of Ahuas, Honduras on May 10 and/or May 11, 2012. This operation was conducted by a joint team that included members of the U.S. Drug Enforcement Administration.
- All documents relating in whole or in part to any subsequent investigation of the above incident.
- All video recordings and digital images of the above incident, including those shown to Congressional aides and reporters from the New York Times as described in the July 23, 2012 story "Video Adds to Honduran Drug Raid Mystery" by Thom Shanker and Charlie Savage, a copy of which I have enclosed.
- Any of the following specific documents relating to the above incident: Report of Investigation; teletype or other written and/or electronic communications between the SAC responsible for Honduras in May 2012 and other offices in the D.E.A., including Headquarters; any internal communications and/or reports produced by the D.E.A.'s Office of Investigations; any internal documents, reports, and/or findings from the D.E.A. Review Board; any internal documents, reports, and/or findings from the D.E.A.'s Office

of Professional Responsibility.

-All Reports of Shooting Incidents taking place in Honduras or Honduran territorial waters between January 1, 2012, and the present.

As the FOIA requires, please release all reasonably segregable nonexempt portions of documents.

In order to help to determine my status to assess fees, you should know that I am a representative of the news media affiliated with The New Yorker magazine.

I request a waiver of all fees for this request. Disclosure of the requested information to me is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in my commercial interest. The New Yorker magazine has asked me to write an article about U.S. drug enforcement efforts in Honduras over the past two years. This article will contribute significantly to public understanding of this event.

I agree to pay reasonable duplication fees for the processing of this request.

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the Act. I, of course, reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

As I am making this request as a journalist and this information is of timely value, I would appreciate your communicating with me by telephone, rather than by mail, if you have questions regarding this request. If you have any questions regarding this request, please contact me at 267-288-7444, 347-927-0777, or [thecolor12@gmail.com](mailto:thecolor12@gmail.com). If you would like to confirm my affiliation with the New Yorker magazine, please contact Willing Davidson here: [willing\\_davidson@newyorker.com](mailto:willing_davidson@newyorker.com) or by phone at 212-286-5400.

I am willing to pay fees for this request up to a maximum of \$100. If you estimate that the fees will exceed this limit, please inform me before processing my request.

I ask that you consider giving this request Expeditious Handling. My compelling need is as follows: I am a member of the news media investigating U.S. counternarcotics operations in Honduras. Part of my investigation deals with shootings that have taken

place in Honduras relating to these operations. This is a breaking news story, as some of these incidents (as well as the overall counternarcotics policy of the United States in the region) are currently the subject of multiple investigations by government agencies in the United States and Honduras.

I hereby certify that the above statements are true and accurate to the best of my knowledge.

I look forward to your reply within twenty days, as the statute requires. Thank you for your assistance with this request.

Sincerely,

Mattathias Schwartz

## Exhibit B

**The New York Times**

June 22, 2012

# Video Adds to Honduran Drug Raid Mystery

By **THOM SHANKER** and **CHARLIE SAVAGE**

WASHINGTON — Aerial surveillance video of a fatal shootout during a counternarcotics mission in [Honduras](#) last month shows a long, dugout-style boat ramming a smaller canoe carrying Honduran and American agents — and a seized cocaine shipment — followed by a brief but furious round of gunfire.

The video answers some questions while raising new ones about a mission that put a spotlight on intensifying American involvement in counternarcotics operations in Central America.

The incident unfolded on a river near the town of Ahuas after a drug smuggling plane being tracked from Venezuela landed at an airstrip and its cargo was unloaded and taken to a boat. American helicopters carrying Honduran police officers and a commando-style squad of agents from the [Drug Enforcement Administration](#) swooped in and seized the cocaine.

Shortly thereafter, a firefight erupted in which four Hondurans in another boat were killed. Officials in both countries have insisted that no American agent fired a weapon in the exchange, but there have been differing accounts about whether the casualties were bystanders or were part of the smuggling operation.

It has not previously been reported that the matter began with one boat ramming a second one. Still, the video does not resolve the identities or motive of those aboard the boat that collided with the vessel carrying the agents, and who may have fired upon them. Nor does it explain the otherwise contradictory statements of some survivors of the shooting that they were innocent villagers attacked without cause.

But the video appears to have satisfied Congressional staff members that the American agents on the raid did not fire their weapons.

“There was no issue that made us think that D.E.A. had done something that was questionable,” said a senior aide on the Senate Foreign Relations Committee who watched the video.

The video was taken from a United States [Customs and Border Protection](#) P-3 surveillance aircraft, and has been circulating among government agencies — and shown in briefings to Congressional aides — for the past several weeks. The New York Times was allowed to view the video by a person who was not officially authorized to release it because it remains evidence in a sensitive law enforcement inquiry.

It shows that within minutes after the cargo was loaded onto the canoe-style boat on the river at a communal dock, four helicopters appeared above the village, kicking up clouds of dust. They dropped flares, and Honduran and American drug agents dropped by rope to the ground.

The smugglers scattered, abandoning the boat, which began to drift. Three figures, identified by officials as two Honduran policemen and one D.E.A. agent, boarded the boat. One, identified as the American agent, moved to one end of the craft and began working to get the motor started.

As the surveillance aircraft and the helicopters circled, a similar but larger river craft approached and was the only other vessel that can be seen along that swath of river. Several people were standing in the front and back. There was a shadowy place in the middle, which could have been a tarp covering people or cargo, a bench or an empty space.

The second boat, clearly under power, cut a zigzag course along the river toward the boat carrying the Honduran and American agents, ramming one end.

In the seconds before contact, there were some flashes in the video, which American officials said were indications that the occupants of the larger boat had fired. After the ramming, a brief but ferocious flurry of shots from the boat carrying the agents was clearly visible.

As the larger boat slid alongside and then moved away, there also appeared to be a spray of bullets across its middle, said by officials to be a volley of machine-gun fire from the Honduran door gunner aboard one of the helicopters.

Later that day, Honduran security officials announced the raid, saying that two drug traffickers had been killed in a shootout and that three other men had escaped by leaping into the water from a canoe carrying cocaine. They apparently omitted any mention that Americans were involved.

But that account soon came under question when the mayor of Ahuas told Honduran reporters, and later repeated to The Times, that helicopters carrying Honduran and American drug agents had been pursuing a boat with smugglers when the government forces mistakenly opened fire on another boat carrying villagers who were fishing, killing four, including two pregnant women.

Disputing the mayor's version, American and Honduran officials briefed on the matter said that after a joint team had landed and taken control of a boatload of drugs, a second boat approached and fired upon them. The Honduran police and a helicopter door gunner returned fire and the second boat withdrew, they said.

Another account was provided to a Times reporter who visited Ahuas and was shown a long blue boat with about half a dozen bullet holes. The reporter talked with three witnesses, including a woman in the local hospital with bullet wounds in both legs, Hilda Lezama, who identified herself as the owner of the boat.

Ms. Lezama said she and her husband were running a river taxi service, bringing 11 passengers on a six-hour boat ride from a larger town on the coast upriver and traveling at night because it was not as hot. Just before 3 a.m., they went ashore and had begun to climb onto land when four helicopters appeared overhead and they came under gunfire, she said.



But, reached by telephone on Friday, Ms. Lezama said her river taxi did not ram any boat with the drugs on it. She reiterated that all the passengers on her boat were innocent. “I didn’t see the boat with drugs on it. The police told us that afterward. We didn’t see any collision or anything,” she said.

Several American officials said there was no other shooting beyond the ramming incident. The video viewed by The Times – apparently the same as shown to congressional staff – ends shortly after that firefight.

*Damien Cave contributed reporting from Vero Beach, Fla.*

## Exhibit C



**U.S. Department of Justice**  
**Drug Enforcement Administration**

SEP 10 2012

Case Number: 12-00500-F

Subject: Requesting all documents relating in whole or in part to an operation that took place in or around the town of Ahuas, Honduras on May 10 and/or May 11, 2012, etc.

Mattathias Schwartz  
The New Yorker  
630 NW Culpepper Terrace  
Portland, OR 97210

Dear Mr. Schwartz:

This letter responds to your Freedom of Information/Privacy Act (FOI/PA) request dated August 27, 2012, received by the Drug Enforcement Administration (DEA), Freedom of Information/Privacy Act Unit (SARF), seeking access to DEA records. Your request has been opened and assigned the above case number. Please include this case number when corresponding with this office.

You are advised that unusual circumstances apply to your request because you seek investigative records. As defined under the FOIA, unusual circumstances include the need to search for, and collect, records from field facilities. 5 USC § 552 (a)(6)(B)(iii). While FOIA and Privacy Act requests are centrally processed by this office at DEA Headquarters, complete investigative files are maintained at, and must be retrieved from, respective DEA field offices, worldwide. As a result of these unusual circumstances, DEA will need additional time to act on your request as discussed below.

This notice of unusual circumstances extends the time for DEA to make a determination on your request an additional ten working days, for a total of 30 working days from the date of your request. However, based on the processing of your request on a first-in, first-out basis, and the current substantial backlog of requests for DEA records, we do not expect a determination to be made on your request within the 30 working days. Rest assured that DEA will act on your request promptly when it is next in the processing queue. You are further advised that you may modify your request by limiting its scope to speed processing and/or you may seek an alternative time frame for processing your request or modified request.

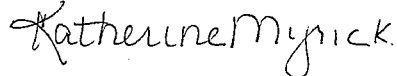
Case Number: 12-00500-F

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This letter confirms your obligation that by filing your request, you have agreed to pay all applicable fees charged under 28 C.F.R. § 16.11, up to \$25.00. No fees are due at this time. If you have any questions regarding this letter, you may contact our Customer Service Hotline Representative on (202) 307-7596 or mail your correspondence to:

DEA HEADQUARTERS  
ATTN: FOI/PA UNIT (SARF)  
8701 MORRISSETTE DRIVE  
SPRINGFIELD, VIRGINIA 22152

Sincerely,

A handwritten signature in cursive script that reads "Katherine Myrick".

Katherine L. Myrick, Chief  
Freedom of Information/Privacy Act Unit  
FOI/Records Management Section

## Exhibit D



**U.S. Department of Justice**  
Drug Enforcement Administration

Case Number: 12-00500-F

SEP 10 2012

Subject: SCHWARTZ, MATTATHIAS

Mattathias Schwartz  
630 NW Culpepper Terrace  
Portland, Oregon 97210

Dear Mr. Schwartz:

This letter responds to your Freedom of Information/Privacy Act (FOI/PA) request dated 27 August 2012, addressed to the Drug Enforcement Administration (DEA), FOI/Records Management Section, Operations Unit (SARO), seeking access to DEA records pertaining to the above referenced subject.

The Department of Justice (DOJ) has provided guidance to Federal Agencies so that each request for expedited treatment receives consideration for "Exceptional need or urgency." See 28 C.F.R. § 16.5 (d). Under the FOIA, requests...will be taken out of order and given expedited treatment whenever it is determined that they involve:

- (i) Circumstances in which the lack of expedited treatment could reasonably be expected to pose an imminent threat to the life or physical safety of an individual;
- (ii) An urgency to inform the public about an actual or alleged federal government activity, if made by a person primarily engaged in disseminating information;
- (iii) The loss of substantial due process rights; or
- (iv) A matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence.

The FOI/Records Management Section, Operations Unit makes a determination regarding the first three standards while the DOJ's Director of Public Affairs makes the initial determination regarding the fourth standard. See id. § 16.5(d)(2). In your letter, you requested expedited processing of your request because "I am a member of the news media investigating U.S. counter narcotics operations in Honduras ..." I have construed your request for expedited treatment as made pursuant to the second (ii) standard listed above. Based on the information you provided, your request is not sufficient to warrant expedited treatment under this standard (demonstrating that a particular urgency concerning actual or alleged federal government activity beyond the public's right to know about government activities exists). Consequently, your request for expedited processing is denied.

Case Number: 12-00500-F

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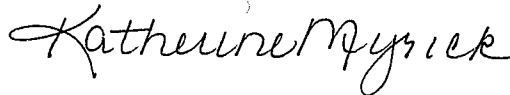
If you wish to appeal in this matter regarding your request for expedited treatment, you may do so within 60 days from the date of this letter pursuant to 28 C.F.R. § 16.9. The appeal should be sent to the following address, with the envelope marked "FOIA Appeal":

DEPARTMENT OF JUSTICE  
OFFICE OF INFORMATION POLICY  
NYAV BUILDING, 11<sup>TH</sup> FLOOR  
WASHINGTON, D.C. 20530

Accordingly, your request will be handled expeditiously. Please be assured that your request is being handled as equitably as possible. If you have any questions regarding this letter, please contact me on (202) 307-7596 or forward your correspondence, referencing your case number to the following address:

DEA HEADQUARTERS  
ATTN: OPERATIONS UNIT (SARO)  
8701 MORRISSETTE DRIVE  
SPRINGFIELD, VIRGINIA 22152

Sincerely,

A handwritten signature in cursive script, reading "Katherine Myrick".

Katherine L. Myrick, Chief  
Freedom of Information/Privacy Act Unit  
FOI/Records Management Section

## Exhibit E



919 THIRD AVENUE NEW YORK NEW YORK 10022-3908

JENNER & BLOCK LLP

**FREEDOM OF INFORMATION ACT APPEAL**

August 2, 2013

**Via UPS**

DEA Headquarters  
ATTN: FOI/AP Unit  
8701 Morrisette Drive  
Springfield, VA 22152

Carl N. Wedoff  
Tel 212 891-1653  
Fax 212 909-0830  
cwedoff@jenner.com

**Re: Appeal of Constructive Denial of Freedom of Information Act Request  
DEA 12-500-F**

Dear Sir or Madam:

This firm represents Mattathias Schwartz in connection with his above-referenced Freedom of Information Act ("FOIA") request to the Drug Enforcement Administration ("DEA"). I am writing to appeal the failure of the DEA to adequately respond to the request.

**I. The Request**

On August 27, 2012, Mattathias Schwartz submitted a FOIA request to the DEA seeking copies of the following records:

1. All documents relating in whole or in part to an operation that took place in or around the town of Ahuas, Honduras on May 10 and/or May 11, 2012 (the "Incident").
2. All documents relating in whole or in part to any subsequent investigation of the above incident.
3. All video recordings and digital images of the Incident, including those shown to Congressional aides and reporters from the New York Times as described in the June 23, 2012 story "Video Adds to Honduran Drug Raid Mystery" by Thom Shanker and Charlie Savage. (A copy of the article is attached to this letter.)
4. Any of the following specific documents relating to the above incident: Report of Investigation; teletype or other written and/or electronic communications between the SAC responsible for Honduras in May 2012 and other offices in the DEA, including Headquarters; any internal communications and/or reports produced by the DEA's Office of Investigations; any internal documents, reports, and/or findings from the DEA Review

August 2, 2013

Page 2

Board; any internal documents, reports, and/or findings from the DEA's Office of Professional Responsibility.

5. All Reports of Shooting Incidents taking place in Honduras or Honduran territorial waters between January 1, 2012, and the date of the request.

Mr. Schwartz also requested expedited handling of his FOIA request.

In a letter dated September 10, 2012, the DEA acknowledged receipt of Mr. Schwartz's request. In the acknowledgment, the DEA stated that "unusual circumstances" applied because the request included investigative records, and therefore, the DEA would not be able to respond to the Request within the thirty working days set forth in FOIA. In a separate letter, also dated September 10, 2012, the DEA denied Mr. Schwartz's request for expedited processing.

Following receipt of the two letters dated September 10, 2012, Mr. Schwartz contacted the DEA to ascertain the status of his request. He spoke to William "Chip" Taylor, a DEA FOIA specialist assigned to this matter, who indicated that the responsive material had been collected and was being reviewed by the DEA's general counsel. The DEA did not provide any determination about a timeline for a response to the request.

Following this firm's retention in June 2013, this writer and Mr. Taylor exchanged a series of voicemails and telephone calls regarding Mr. Schwartz's request. In a June 26, 2013 voicemail – over 9 months after Mr. Schwartz was told that the matter was under review – Mr. Taylor indicated that the general counsel would meet the following day to review the request. After leaving several additional voicemails for Mr. Taylor to follow up on this review, this writer spoke with Mr. Taylor by phone on July 9, 2013. Mr. Taylor indicated that the general counsel's office had met but that Mr. Taylor had to "revise some things" and the matter required additional follow-up before any response would be provided. Mr. Taylor stated that the agency was unable to provide any timetable for a determination from the DEA, and that several further rounds of review might be necessary before Mr. Schwartz could expect any response. In a July 19, 2013 voicemail to this writer, Mr. Taylor stated that "not much had changed," that the agency was "reviewing papers and videos," and that he could not provide a date certain when a response would be provided. In an August 1, 2013 voicemail, Mr. Taylor again stated that "not much has changed," and although the "chief counsel's office has finished reviewing" the requests, he was unable to provide an estimate on when the DEA would provide a response.

Over eleven months have passed since Mr. Schwartz submitted his request, and the DEA has not provided any responsive documents nor identified any grounds for continued withholding of the requested records. Not only has the DEA failed to cite an exemption which may be applicable to these records, they have not denied that, as a result of the attached New York Times article, the essential facts of the incident have been disclosed and subject to public discussion and debate, without any prejudice to the government.

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## **II. The DEA's Failure to Respond to the Request Within the Time Period Required Under FOIA Constitutes a Constructive Denial of the Request**

As you know, FOIA was meant to guarantee prompt access to important government records. To that end, the FOIA grants an agency no more than twenty days in which to respond to a request, and thirty days when "unusual circumstances" apply. 5 U.S.C. § 552(a)(6). "[I]f an agency fails to make and communicate its 'determination' whether to comply with a FOIA request within certain statutory timelines, the requester 'shall be deemed to have exhausted his administrative remedies.'" *Citizens for Responsibility & Ethics in Wash. v. FEC*, 711 F.3d 180, 184 (D.C. Cir. 2013) (hereinafter "*CREW*") (quoting 5 U.S.C. § 552(a)(6)(C)(i)). After administrative remedies are exhausted, a requester may bring suit in federal district court. *Id.* at 182.

[I]t is not enough that, within the relevant time period, the agency simply decide[s] to later decide. . . . [T]he agency must at least inform the requester of the scope of the documents that the agency will produce, as well as the scope of the documents that the agency plans to withhold under any FOIA exemptions.

*Id.* at 186. *See also Coleman v. DEA*, 714 F.3d 816, 823 (4th Cir. 2013) (finding DEA's failure to act deemed requester's administrative appeal exhausted).

The DEA's delay in responding to this request not only violates its statutory obligations, but also violates President Obama's plain direction regarding agency treatment of public information: "All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government." *Mem. for the Heads of Executive Dep'ts and Agencies*, 74 Fed. Reg. 15, 4683 (Jan. 26, 2009).

It has been nearly a year, and well over 200 business days, since Mr. Schwartz's request was received by the DEA. (A copy of Mr. Schwartz's request and a photocopy of the DEA's response indicating receipt thereof are enclosed.) This period clearly exceeds the 30 days provided by the statute when unusual circumstances, which do not appear to be present here, are claimed. The DEA's failure to respond to Mr. Schwartz's request within the time period required by FOIA serves as a constructive denial of the request, and Mr. Schwartz is deemed to have exhausted his administrative remedies. *See* 5 U.S.C. § 552(a)(6)(C)(i).

Although the DEA's responses have clearly failed to comply with the response required under *CREW* (thereby providing grounds for immediate judicial review), Mr. Schwartz, through this letter appeal of the DEA's constructive denial of his FOIA request, seeks to provide the DEA with a final opportunity to respond to his request before instituting a lawsuit. If, however, Mr. Schwartz does not receive a determination from the DEA within twenty days of receipt of

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this appeal, *see* 5 U.S.C. § 552(a)(6)(A)(ii), he will seek appropriate judicial review. Upon reconsideration, the DEA should reverse its constructive denial and provide Mr. Schwartz access to the requested material.

The information that Mr. Schwartz has requested is releasable under FOIA and is not validly protected by any of the Act's exemptions. The fact that an incident took place in Ahuas, Honduras in May 2012 is plainly in the public domain and a matter of significant public interest. *See, e.g.,* Thom Shanker & Charlie Savage, *Video Adds to Honduran Drug Raid Mystery*, N.Y. TIMES, Jun. 23, 2012, <http://www.nytimes.com/2012/06/23/world/americas/video-adds-to-mystery-of-drug-mission-in-honduras.html>; Geoff Earle & S.A. Miller, *State Department Stymied Probe Into Shooting of Four Hondurans*, N.Y. POST, Jun. 12, 2013, [http://www.nypost.com/p/news/national/state\\_death\\_puzzle\\_DEPZ3ToAeUUxLhL2djtrkK](http://www.nypost.com/p/news/national/state_death_puzzle_DEPZ3ToAeUUxLhL2djtrkK). To the extent any of the requested records are subject to exemptions under FOIA, the DEA has yet to make any indication to that effect, thereby making any challenge to the denial impossible. And even if certain of these records are properly exempted under FOIA, Mr. Schwartz believes the bulk of these records should be reasonably segregable and subject to disclosure.

DEA's failure to respond to Mr. Schwartz's request has violated its statutory obligations and denied the public valuable insight into government operations. I therefore urge that, to prevent unnecessary litigation, the DEA produce records responsive within the twenty-day window provided under FOIA. I look forward to your help in resolving these matters without further delay. Please do not hesitate to contact me directly with any questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to read 'Carl N. Wedoff', is written over a horizontal line.

Carl N. Wedoff

CNW:cnw